

1992

State of Utah v. Steven Michael Stilling : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 920186CA

STATE OF UTAH,

Plaintiff,

vs.

STEVEN MICHAEL STILLING,

Defendant.

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Case No. 920186-CA

Oral Argument
Priority No. 3

REPLY BRIEF OF APPELLANT

APPEAL FROM THE ORDER DENYING WITHDRAWAL OF GUILTY PLEAS
OF THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY, UTAH,
THE HONORABLE DAVID E. ROTH, PRESIDING.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff,	:	Case No. 920186-CA
	:	
vs.	:	
	:	
STEVEN MICHAEL STILLING,	:	Oral Argument
	:	Priority No. 3
	:	
Defendant.	:	

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	Case No. 920186-CA
	:	
v.	:	
	:	Priority No. 3
STEVEN MICHAEL STILLING,	:	
	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

The following points are submitted by Appellant Steven Stilling ("Stilling") in reply to the arguments presented in the State's responsive brief.

ARGUMENT

I. THE UTAH SUPREME COURT'S RECENT DECISION IN WILLETT v. BARNES IS DISPOSITIVE OF THE ISSUES PRESENTED BY THIS APPEAL.

The fundamental issue presented by this appeal is whether the trial court substantially complied with Rule 11 of the Utah Rules of Criminal Procedure ("Rule 11") and other applicable law in accepting the guilty pleas of Stilling.¹ On October 28, 1992, the Utah Supreme Court issued an opinion which directly addresses the issue of what is required of the trial court in accepting a guilty plea. Willett v. Barnes, 199 Utah Adv. Rep. 3 (1992). The trial court's actions in this case fail to comply with Willett.

¹ Stilling entered his pleas of guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), which allowed Stilling to maintain his innocence while pleading guilty in order to accept a favorable plea bargain.

In Willett, the appellant sought to withdraw his plea of guilty to a charge of first degree murder on the grounds that, among other things, the trial court failed to establish a factual basis for the plea. Id. Addressing the appellant's claim, the Supreme Court stated:

This court's decision in State v. Breckenridge, 688 P.2d 440 (Utah 1983), established that before accepting a guilty plea, a trial court must develop a factual basis upon which to base a conviction of the charged crime. In Breckenridge, we concluded that even though the plea colloquy did include a recitation of surrounding facts, as a matter of law those facts were insufficient to support the charge. Id. at 442-44. In this case, the colloquy contains no recitation of any facts surrounding the death of the victim. We therefore conclude that the plea colloquy failed to develop the factual basis necessary for the court to properly accept Willett's plea.

On appeal, the State contends, however, as the district court concluded, that the "record as a whole" established a sufficient factual basis to accept the guilty plea, even if the plea hearing did not. Willett's plea occurred before our decision in State v. Gibbons, 740 P.2d 1309 (Utah 1987), and the pre-Gibbons rule required reviewing courts to uphold guilty pleas as long as the record as a whole demonstrated "substantial compliance" with constitutional and procedural requirements. State v. Hoff, 814 P.2d 1119, 1123-24 (Utah 1991).

Applying the substantial compliance test, we conclude the court below erred. In the entire record, nothing supports a finding that an adequate factual basis existed at the time Willett entered his plea. The State has not adverted to any facts regarding the events themselves that could form the basis of a conviction. The closest anything in the record comes to establishing a factual basis is a brief colloquy, prompted by Mr. Watson, a deputy county attorney, during the entry of Harley Willett's guilty plea on the second degree murder charge:

MR WATSON: Perhaps the court would want to inquire whether or not there is a factual basis from this particular defendant with regard to the entry of this plea Your Honor.

THE COURT: Suppose you state for the court briefly Mr. Willett how exactly it happened on the 20th of November?

MR. HARLEY WILLETT: Well, I aided and abetted my father.

THE COURT: In doing what?

MR. HARLEY WILLETT: In the commission of killing Mr. Dan Okleberry.

THE COURT: I suppose that is adequate Mr. Watson.

The court then accepted Harley Willett's plea. Yet Harley Willett's statement of "how exactly it happened" is merely a legal conclusion, parroting the statutory elements of the crime charged against him. Whether or not it established an adequate factual basis for Harley Willett's plea, it certainly did not validate the guilty plea that Duane Willett has already entered. We thus reverse the district court's conclusion "[t]hat a factual basis for the charge made against the defendant is evident from the record, even though not succinctly stated by or to the Court." [Emphasis added].

The district court also upheld the validity of Duane Willett's plea on a finding "[t]hat although he knew in his own mind that he was not guilty . . . , he wanted to save his son from any jeopardy to the death penalty." To the extent the court treated this finding as a sufficient factual basis to uphold the plea as intelligently and voluntarily made, it misread Breckenridge. In Breckenridge, we suggested that a valid guilty plea required a "record of facts" showing either "that the charged crime was actually committed by the defendant, or that the defendant has for some other legitimate reason intelligently and voluntarily entered such a plea." 688 P.2d at 440. But by "record of facts" showing some other legitimate reason for the plea, we meant facts that would substantiate the prosecution of the charge at trial, not merely facts establishing the defendant's motivation for entering the plea.

Breckenridge cited North Carolina v. Alford, 400 U.S. 25 (1970), as an example of other legitimate reasons for pleading guilty. In Alford, the defendant maintained his innocence yet pleaded guilty because he acknowledged the strength of the state's case against him and because by pleading guilty, he avoided risking the death penalty. Id. at 27-29. In denying Willett's petitions, the district court below similarly concluded that Willett

believed he had a legitimate reason to plead guilty because he desired to spare his son the risk of the death penalty and he therefore entered his plea intelligently and voluntarily. But in Alford, the record before the trial court documented facts establishing the strength of the state's case, facts that would have placed the defendant at a serious risk of conviction had he proceeded to trial. Id. Critically, in Willett's case the record reveals no facts that would support the prosecution of the charge or suggest that either Duane Willett or Harley Willett faced a substantial risk of conviction at trial. A court cannot be satisfied that a guilty plea is knowing and voluntary unless the record establishes facts that would place the defendant at risk of conviction should the matter proceed to trial. Therefore, Alford is inapposite, and the factual basis requirement of Breckenridge remains unsatisfied.

Id. at 3-4.

As in Willett, nothing in the record at the time Stilling entered his pleas provides a sufficient factual basis for the trial court's acceptance of his pleas. As the State recognizes in its brief, the only part of the record that provided any factual basis for the pleas was the expiation agreement (a copy of which is attached to the State's brief as appendix 4). See, State's Brief at pp. 19-25. As even the most cursory review of the expiation agreement reveals, the expiation agreement fails to set forth any facts that would support the prosecution of the charges against Stilling or suggest that Stilling faced a substantial risk of conviction at trial. Accordingly, as recognized in Willett, the original trial court could not be satisfied that Stilling's guilty pleas were knowing and voluntary and the second trial court erred in denying Stilling's motion to withdraw his pleas, after having found that the record in 1985 involving the taking of the guilty pleas was not in substantial compliance with Rule 11. R. 159.

II. THE COURT SHOULD RESPECT THE TRIAL COURT'S FINDING OF LACK OF SUBSTANTIAL COMPLIANCE WITH RULE 11.

In its Findings of Facts and Conclusions of Law denying Stilling's motion to withdraw his pleas (attached to Stilling's opening brief as addendum C), the trial court specifically found as follows:

If the court were to rely only on the record as it existed at the time of the pleas, that record would be insufficient to establish substantial compliance with Utah R. Crim. P. 11.

R. 159.

The State now attempts to categorize this critical finding by the trial court as a "subsidiary ruling" and, despite have failed to appeal the trial court's ruling, asks the Court to declare that it was error. State's Brief at p. 15. The Court should not do so.

If the State did not agree with the trial court's ruling, it should have filed a cross-appeal. The State argues that because it got the outcome it wanted, it was "disinclined to appeal any error made en route to the ultimate outcome." State's Brief at p. 15. n. 4. This argument would have been valid had Stilling not appealed the trial court's decision. Stilling, however, filed a timely appeal of the trial court's ruling. Thus, the entire matter was put before the Court and any disinclination on the State's part to appeal a "subsidiary ruling" was removed. If the State believed that the trial court had erred in finding a lack of "substantial compliance" at the time of taking the pleas, it should have filed a notice of cross-appeal within fourteen (14) days of Stilling's notice of appeal. Utah Rule of Appellate Procedure 4. Having

failed to do so, the State is forever barred from having the trial court's finding reviewed by this or any other court.

Should the Court choose to give consideration to the State's improper appeal of the trial court's lack of substantial compliance ruling, it must find that trial court's ruling was correct. As discussed more fully above, the Supreme Court's decision in Willetts requires that at the time Stilling's pleas were accepted by the original trial court, the record contain facts that would support the prosecution of the charges or suggest that Stilling faced a substantial risk of conviction at trial. Willetts, 199 Utah Adv. Rep. at 3-4. As recognized by the trial court and as all but conceded by the State, the record at the time Stilling entered his pleas did not contain such facts. Thus, the trial court's so-called "subsidiary ruling" was not error. Rather, it was a well founded recognition of the law.

III. THE AFFIDAVIT OF STILLING'S FORMER COUNSEL SHOULD NOT HAVE BEEN CONSIDERED BY THE TRIAL COURT.

Although the Court can decide this case on Willetts alone, it could give guidance to the trial court by addressing the propriety or legality of the affidavit of Stilling's former counsel which was submitted by the State over six years after the pleas were entered. That affidavit was the sole ground upon which the trial court denied Stilling's motion to withdraw his pleas and is the only entry in any of the records that could provide even the slightest compliance with Rule 11. This affidavit, however, is a violation

of the most inviolable of privileges and should never have found its way into any record.

The law has long recognized the absolute need for an attorney-client privilege.

The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. . . [I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.

Fisher v. United States, 425 U.S. 391, 401 (1976).

"The privilege recognizes that sound legal advice or advocacy depends upon the lawyer being fully informed by the client."

Upjohn Company v. United States, 449 U.S. 383, 389 (1981).

In Utah, the legislature recognized the sanctity of the privilege when it enacted Utah Code Ann. § 78-24-8 which provides in pertinent part:

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

. . .

(2) An attorney cannot, without the consent of his client, be examined as to any communication made by his client to him, or his advice given therein, in the course of professional employment; nor can an attorney's secretary, stenographer or clerk be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in such capacity.

Utah Code Ann. § 78-51-26(5) further provides that it is the duty and obligation of an attorney to "maintain inviolate the confidences, and at every peril to himself to pursue the secrets of his client." Finally, Utah Rule of Evidence 504 provides that:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest . . .

The State, the trial court, and, most egregiously, Stilling's former attorney all ignored Stilling's privilege to keep secret discussions between he and his former counsel and acted to violate Rules 1.6² and 1.9³ of the Utah Rules of Professional Conduct.

² Rule 1.6 provides:

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure.

(b) A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death of substantial bodily harm, or substantial injury to the financial interest or property of another;

(2) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or

(4) To comply with the Rules of Professional Conduct or other law.

³ Rule 1.9 provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

The affidavit of Stilling's former counsel describes discussions which occurred between Stilling and him concerning the alleged crimes as well the legal strategy pursued in defending Stilling. It is exactly this type of communication which the privilege seeks to protect. See, Utah Rule of Evidence 504. Stilling had and continues to have the right to prevent such communications from being disclosed and, as such, his former counsel's affidavit should never have been submitted to or considered by the trial court.

In an attempt to support the obvious violation of the attorney-client privilege, the State advances the argument that Stilling has claimed ineffectiveness of counsel and, in so doing, has waived the privilege. This argument is wholly unfounded. Stilling never intended to assert any claim of ineffectiveness of counsel and, as recognized by the State, Stilling's counsel made this point clear in the trial court.⁴ State's Brief at pp. 31-32. The only matter before the trial court was Stilling's motion to withdraw his guilty pleas based upon a lack of substantial

(a) Represent another person in the same or a substantially factually related matter in which that person's interests are materially adverse to the interests of the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

⁴ In so stating, Stilling specifically reserves any claims he may have against his former attorney based on that attorney's blatant violation of the attorney-client privilege.

compliance with Rule 11. Accordingly, the State's reliance on Utah Rule of Evidence 504(d) and Utah Rule of Professional Conduct 1.6(b)(3) is clearly misplaced. The language of these exceptions makes it clear that they only apply to disputes regarding the quality or nature of an attorney's representation of a client. They are of no matter where there is only a dispute as to the trial court's compliance with the law.

Inasmuch as the affidavit served as the sole basis for the trial court's denial of Stilling's motion, the trial court's ruling was clearly in error and must be reversed by the Court.

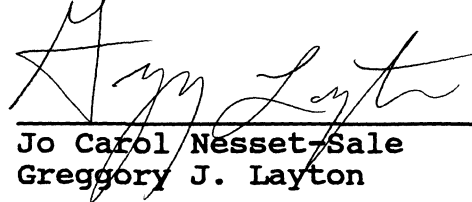
CONCLUSION

The original trial court failed to even substantially comply with Rule 11 when it accepted Stilling's guilty pleas. The record at the time the pleas were accepted contained no facts that supported the prosecution of the charges or suggested that Stilling faced a substantial risk of conviction should the matter proceed to trial. The only facts in any of the records which would support acceptance of the guilty pleas are found in the post-plea affidavit of Stilling's former counsel. This affidavit undeniably violates the attorney-client privilege and should never have been submitted to or considered by the trial court. For these reasons, the Court should reverse the trial court's denial of Stilling's motion to withdraw his pleas and remand the case for further proceedings upon Stilling's plea of not guilty to the original charges. As the Supreme Court recognized in Willet, "[n]o legitimate interest of

the state can be served by the continued incarceration of a man on the strength of a guilty plea that does not satisfy the requirements of the law."

RESPECTFULLY SUBMITTED this 4th day of December, 1992.

HALEY & STOLEBARGER



Jo Carol Nesset-Sale
Greggory J. Layton

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 1992, four (4) true and correct copies of the foregoing brief were mailed to R. Paul Van Dam, Utah Attorney General, J. Kevin Murphy, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114.

Patricia A. Lalligan